STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS BROOKS,

Plaintiff-Appellant,

v

BURGER KING CORPORATION, VALERIE CARTER, V & J FOODS OF MICHIGAN, INC., and V & J FOODS, INC.,

Defendants-Appellees.

UNPUBLISHED
June 23, 2005

No. 252576
Oakland Circuit Court
LC No. 2001-031150-NO

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff slipped and fell at night on a depression in the pavement surrounding a sewer drain located in defendants' parking lot, which did not have lighting. The accident occurred while plaintiff was running from a pack of wild dogs. On appeal, plaintiff argues that the trial court should not have allowed defendants to avail themselves of the open and obvious defense in order to avoid liability for a condition that was not open or obvious since it was not visible at night. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties

in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001) (internal citation omitted). However, a premises owner owes no duty to protect or warn invitees against open and obvious hazards. *Id.* at 516-519. This is not an exception to the duty, but a part of its definition. *Id.* at 516. "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, the invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). "Whether a particular danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection." *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105; 689 NW2d 737 (2004). If, however, "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517. Under *Lugo*, special aspects analysis requires that there be "*truly* 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm . . . ." *Id.* (emphasis added). A "special aspect" might exist where you have: (a) an unavoidable risk such as a single obstructed exit; or (b) "a substantial risk of death or severe injury," such as "an unguarded thirty foot deep pit in the middle of a parking lot." *Id.* at 518. A special aspect must involve, in other words, "a uniquely high likelihood of harm or severity of harm" in order to avoid the open and obvious bar. *Id.* at 519.[1]

In *Lugo*, the plaintiff fell in the defendant's parking lot after stepping in a pothole. *Id.* at 514. The Supreme Court held the resulting claim was barred by the open and obvious danger doctrine. *Id.* The basis for the Court's holding was that the "plaintiff had not provided evidence of special aspects of the condition to justify imposing liability on defendant despite the open and obvious nature of the danger." *Id.* The same result obtains here. Sewer grates are a universal aspect of parking lots, and everyone is aware of their existence. The risk of falling from stepping in a depression where a sewer grate is located is a hazard that a person of ordinary intelligence could be expected to perceive when crossing a parking lot.

Although the lack of lighting and the largeness of the hole on one side may have made the hazard greater, the lower court's reasoning remains true. The lower court reasoned that sewer grates are universal aspects of parking lots, and that any person, by virtue of being in a parking lot, should expect one. This reasoning is not diminished by the lighting or the somewhat larger depression on one side of the hole, and this reasoning is consistent with *Lugo*, which holds

[1] The question of uniquely dangerous potential for severe harm is analyzed "a priori," that is, before the incident involved in a particular case. *Lugo, supra* at 519 n 2.

that potholes in parking lots are to be expected. *Id.* at 523. Therefore, the sewer grate is an open and obvious danger, and the analysis must proceed to special aspects criteria.

The hole at issue in this case would fall under what the *Lugo* Court described as "ordinary potholes in a parking lot," which do not give rise to special aspects under *Lugo*. "Indeed, an 'ordinarily prudent' person [*Bertrand v Alan Ford, Inc*, 449 Mich 606, 609, 615; 537 NW2d 185 (1995)], would typically be able to see the pothole and avoid it." *Lugo, supra* at 520. A landowner would also not expect an invitee to be injured by a depressed sewer grate despite knowledge of the hazard. Furthermore, a hole in the pavement like the kind in question here does not pose a uniquely high likelihood of harm, and "there is little risk of severe harm." *Id.*

In *Singerman v Municipal Services Bureau*, 455 Mich 135; 565 NW2d 383 (1997), the plaintiff was struck in the eye by a hockey puck while on an ice hockey rink. He claimed the rink was not adequately lit, causing him to be unable to react to the puck in time. The Supreme Court disagreed, finding the risk open and obvious. The Court found it noteworthy that the lighting allegedly was "consistently inadequate, not subject to unexpected fluctuations or other changes. There was nothing to prevent plaintiff from realizing that the rink was inadequately lighted." *Id.* at 144. While *Singerman* involved inadequate lighting as opposed to nighttime darkness, it emphasized the consistency of the lighting deficiency as a factor weighing in favor of the open and obvious defense. In the case at bar, too, there is no allegation of fluctuation in the illumination of the parking lot, so a pedestrian would be on notice of the need to advance cautiously.

Plaintiff testified that at the time he fled from the dogs, his attention was mostly on the dogs. Because plaintiff's mind and attention were on the dogs and not the ground surface, it cannot be said that the darkness of nighttime was a special aspect posing an unreasonably dangerous risk. Indeed, plaintiff testified that even daylight would not have prevented his fall. Accordingly, plaintiff's own testimony does not support the argument that parking lot lighting would have made the difference.

The presence of the wild dogs on the premises also cannot qualify as a special aspect. First, it is not an aspect of the danger from the pothole, the hazard resulting in the injury. Second, plaintiff testified that he could not have seen the pothole even if he had not focused on the dogs, and in fact, plaintiff jogged from his car to the pay phone before making the telephone call without seeing the pothole. Also, the risk of tripping while fleeing from wild dogs is not unavoidable. A different route could have been taken, and such risk lacks both a uniquely high probability and a risk of severe injury or death. Therefore, the pack of wild dogs does not qualify as a special aspect.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray